

UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD

1621 ROUTE 22 WEST OPERATING
COMPANY, LLC d/b/a SOMERSET VALLEY
REHABILITATION & NURSING CENTER,

Employer,

and

1199 SEIU UNITED HEALTHCARE
WORKERS EAST, NEW JERSEY REGION,

Petitioner.

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NLRB Case No. 22-RC-13139

**EMPLOYER'S EXCEPTIONS TO THE HEARING OFFICER'S
REPORT AND RECOMMENDATIONS ON OBJECTIONS**

Comes now the Employer, 1621 Route 22 West Operating Company, LLC d/b/a Somerset Valley Rehabilitation and Nursing Center ("Employer") and hereby files the following Exceptions to Hearing Officer Rachel Mead Zweighaft's January 19, 2011, Report and Recommendations on Objections. The rationale and legal precedent supporting the Employer's Exceptions are set forth in the accompanying Brief.

- I. **Employer Excepts to the Following Factual Findings of the Hearing Officer on the Ground That They Are Not Supported by the Weight of the Evidence in the Record.**¹
 1. Employer excepts to the Hearing Officer's finding that an election by secret ballot was conducted as contrary to any record evidence, credited or uncredited. (H.O. 2).²

¹ Some of these "factual findings" may involve mixed questions of fact and law.

2. Employer excepts to the Hearing Officer's finding that "with a few exceptions the quotations [on the Petitioner's flyer] are substantially verbatim to the answers employees provided on their releases as contrary to any record evidence, credited or uncredited." (H.O. 6)
3. Employer excepts to the Hearing Officer's finding that "all [employee witnesses] admitted that the release forms in evidence contained their names and handwriting as contrary to any record evidence, credited or uncredited. (H.O. 10)
4. Employer excepts to the Hearing Officer's finding that the quote used for employee Annie Stubbs on the Petitioner's Flyer (Er. 1) came from portions of the Release Form Stubbs completed herself. (H.O. 10, Er. 2, p. 57).
5. Employer excepts to the Hearing Officer's finding that record evidence does not support the Objection that the employee statements appearing on pro-Union literature were obtained or used without employees' permission or were false statements not made by employees as contrary to any record evidence, credited or uncredited. (H.O. 11).
6. Employer excepts to the Hearing Officer's finding that most of the quotations on the flyers are identical or substantially similar to the information provided by employees on the release as contrary to any record evidence, credited or uncredited. (H.O. 12-13).
7. Employer excepts to the Hearing Officer's finding that many employees were accurately quoted on the Petitioner's flyer as contrary to any record evidence, credited or uncredited. (H.O. 12).

² References are as follows: Hearing Transcript ("Tr."); Hearing Officer's Report and Recommendations ("H.O."); Employer's Exhibits ("Er. ____").

8. Employer excepts to the Hearing Officer's finding that use of an inaccurate quote attributed to Fanny Mora on the Petitioner's Flyer was not objectionable because Mora signed a release as contrary to any record evidence, credited or uncredited. (H. O. 13).
9. Employer excepts to the Hearing Officer's finding that employees signed a general release as contrary to any record evidence, credited or uncredited. (H.O. 13).
10. Employer excepts to the Hearing Officer's finding that the inclusion of "I'm voting Yes" in quotations from employees who have expressed support for the Petitioner by signing a release and answering specific questions about why they would like to be represented by a union does not constitute a substantial misrepresentation as contrary to any record evidence, credited or uncredited. (H.O. 13).
11. Employer excepts to the Hearing Officer's finding that the discrepancies on which the Employer relies are minor as contrary to any record evidence, credited or uncredited. (H.O. 13).
12. Employer excepts to the Hearing Officer's finding that "[a]lthough Miguel Roque did not sign a release, he admitted he was accurately quoted" as contrary to any record evidence, credited or uncredited. (H.O. 13).
13. Employer excepts to the Hearing Officer's finding that employees Berrios and Hacker Jones provided signed releases expressing their support for the Petitioner as contrary to any record evidence, credited or uncredited. (H.O. 13).

14. Employer excepts to the Hearing Officer's finding that the discrepancies between the flyer and the releases are minor as contrary to any record evidence, credited or uncredited. (H.O. 14).
15. Employer excepts to the Hearing Officer's finding that there is no evidence that the misrepresentations were pervasive as contrary to any record evidence, credited or uncredited. (H.O. 15).
16. Employer excepts to the Hearing Officer's finding that in all but one case employees signed releases allowing the Petitioner broad use of the information on the releases as contrary to any record evidence, credited or uncredited. (H.O. 16).
17. Employer excepts to the Hearing Officer's finding that there is no evidence that employees were unable to separate truth from untruth as contrary to any record evidence, credited or uncredited. (H.O. 16).
18. Employer excepts to the Hearing Officer's finding that Jacques comments to voters during the election while she was serving as a roving Observer were consistent with the instructions she received not to have conversations with voters, but was allowed to greet voters as contrary to any record evidence, credited or uncredited. (H.O. 16).
19. Employer excepts to the Hearing Officer's finding that "with regard to Jacques' exchange with Mangel, their testimony is consistent, detailed, and specific" as contrary to any record evidence, credited or uncredited. (H.O. 25).
20. Employer excepts to the Hearing Officer's in crediting of the testimony of Jillian Jacques and Maharanie "Shanny" Mangel. (H. O. 25).

21. Employer excepts to the Hearing Officer's finding that Ikurekong was a potentially corroborating witness to Konjoh's version of events as contrary to any record evidence, credited or uncredited. (H.O. 26, fn 9).
22. Employer excepts to the Hearing Officer's finding that Konjoh conceded that Ikurekong was standing next to Jacques on both occasions when Konjoh heard Jacques say "vote yes" to an employee while serving as an election observer as contrary to any record evidence, credited or uncredited. (H.O. 26, fn 9).
23. Employer excepts to the Hearing Officer's finding that even if Jillian Jacques said "vote Yes" to Maharanie "Shanny" Mangel this conduct in relation to one voter could not have affected the outcome of the election as contrary to any record evidence, credited or uncredited. (H.O. 30).
24. Employer excepts to the Hearing Officer's finding that Jillian Jacques's interaction with voters was pertained only to whether the polls were open and whether employees had an opportunity to vote as contrary to any record evidence, credited or uncredited. (H.O. 30).
25. Employer excepts to the Hearing Officer's finding that there was no evidence of Jacques conversing with any employee who was waiting to vote as contrary to any record evidence, credited or uncredited. (H.O. 30).
26. Employer excepts to the Hearing Officer's finding that there is no evidence any employee received a call or text message from the Petitioner in the final moments before they voted as contrary to any record evidence, credited or uncredited. (H.O. 38).

27. Employer excepts to the Hearing Officer's finding without merit the Employer's allegation that the Petitioner engaged in improper electioneering by telling employees it knew how they voted or by stating that it was winning the election. (H.O. 39).
28. Employer excepts to the Hearing Officer's finding that Venette credibly testified that he believed Rice would have already voted based on their prior conversations as contrary to any record evidence, credited or uncredited. (H.O. 40).
29. Employer excepts to the Hearing Officer's finding that there was no evidence Walsh or Venette indicated in a message that they knew whether an employee had already voted as contrary to any record evidence, credited or uncredited. (H.O. 40).
30. Employer excepts to the Hearing Officer's finding that there was no evidence that the Petitioner made statements about who had voted or the outcome of the election as contrary to any record evidence, credited or uncredited. (H.O. 40).
31. Employer excepts to the Hearing Officer's finding that there is no evidence that the Petitioner engaged in any objectionable electioneering by calling or sending text messages to employees on the day of the election as contrary to any record evidence, credited or uncredited. (H.O. 40).
32. Employer excepts to the Hearing Officer's finding that there is no evidence that the Petitioner contacted any employees who were waiting to vote as contrary to any record evidence, credited or uncredited. (H.O. 40).

33. Employer excepts to the Hearing Officer's finding that there is no evidence that the Petitioner made statements about who had voted or the outcome of the election as contrary to any record evidence, credited or uncredited. (H.O. 40).
34. Employer excepts to the Hearing Officer's finding that Walsh credibly testified that he based his text message representation to employees that the Petitioner was winning on the Petitioner's own polling prior to the election and not on any information about the actual election as contrary to any record evidence, credited or uncredited. (H.O. 40, 47).
35. Employer excepts to the Hearing Officer's finding that there is no evidence that employees believed or even suspected the Petitioner was keeping a list of who voted and how they voted as contrary to any record evidence, credited or uncredited. (H.O. 45).
36. Employer excepts to the Hearing Officer's finding that none of the employees could state what Napolitano was doing with her phone as contrary to any record evidence, credited or uncredited. (H.O. 45).
37. Employer excepts to the Hearing Officer's finding that the record evidence failed to establish that the Petitioner maintained a list those individuals who had voted or how they voted as contrary to any record evidence, credited or uncredited. (H.O. 45).
38. Employer excepts to the Hearing Officer's finding that the Employer did not produce any evidence to support its contention that such a list, written or electronic, existed as contrary to any record evidence, credited or uncredited. (H.O. 45).

39. Employer excepts to the Hearing Officer's finding that Employer has not established that the Petitioner engaged in surveillance or created the impression of surveillance on the day of the election as contrary to any record evidence, credited or uncredited. (H.O. 47).
40. Employer excepts to the Hearing Officer's finding that there is no evidence that employees believed their votes were being surveilled as a result of Walsh's text message that the Petitioner was winning while voting polls were open as contrary to any record evidence, credited or uncredited. (H.O. 47).
41. Employer excepts to the Hearing Officer's finding that Walsh's sending voting reminders via text message to employees who had already voted suggested that the Petitioner did not know who had voted as contrary to any record evidence, credited or uncredited. (H.O. 47).
42. Employer excepts to the Hearing Officer's finding that the Employer has not established that the Petitioner kept a list of voters, engaged in surveillance or created the impression of surveillance on the day of the election. (H.O. 47).
43. Employer excepts to the Hearing Officer's finding that none of the employees could verify what Napolitano was doing with her cell phone as contrary to any record evidence, credited or uncredited. (H.O. 55).
44. Employer excepts to the Hearing Officer's finding that the testimony does not establish that the Board Agent was not paying attention to the polling. (H.O. 56).
45. Employer excepts to the Hearing Officer's finding that the Board Agent's statement that she did not see a voter place her ballot in the ballot box suggests

that the Board Agent was paying attention contrary to any record evidence, credited or uncredited. (H.O. 56-57).

46. Employer excepts to the Hearing Officer's not crediting the testimony of Tracy Thomas that she picked up a ballot off the table rather than the Hearing Officer handing it to her. (H.O. 57, n.20).
47. Employer excepts to the Hearing Officer's finding that the Board Agent brought to the election a three sided voting booth, which is constructed to sit on a table or on a base as contrary to any record evidence, credited or uncredited. (H.O. 58).
48. Employer excepts to the Hearing Officer's finding that Sheena Orozco could not see how voters voted as contrary to any record evidence, credited or uncredited. (H.O. 68-70).
49. Employer excepts to the Hearing Officer's finding that there is no credible record evidence that anyone saw how any voter marked his (or her) ballot contrary to any record evidence. (H.O. 72).
50. Employer excepts to the Hearing Officer's finding that there is no evidence that employees reasonably thought their ballots had been seen as contrary to any record evidence, credited or uncredited. (H.O. 73).
51. Employer excepts to the Hearing Officer's finding that the Employer has presented no evidence that the conduct of the Board Agent affected the election as contrary to any record evidence, credited or uncredited. (H.O. 73).
52. Employer excepts to the Hearing Officer's finding that the record establishes that the voting booth provided adequate privacy for voters in this election as contrary to any record evidence, credited or uncredited. (H.O. 74).

53. Employer excepts to the Hearing Officer's failure to address discrepancies in pens used on Release Forms for portions allegedly completed by employees suggesting that portions of the form were completed at different times and/or by different individuals as contrary to any record evidence, credited or uncredited.
54. Employer excepts to the Hearing Officer's failure to consider the effect and impact that the Petitioner's publication of inaccurate, misleading, deceptive and/or fabricated statements attributed to employees by name and photograph in its flyer had on "locking in" those employees to a position.

II. Employer Excepts to the Following Specific Analyses and Conclusions of Law by the Hearing Officer on the Grounds That They Are Not Supported by the Weight of the Evidence in the Record and Are Contrary to Established Board Policy and Law.

55. Employer excepts to the Hearing Officer's misapplication of statutory requirements, and misplaced reliance on and failure to properly distinguish *Physicians and Surgeons Ambulance Service*, 356 NLRB No. 42 (2010) as contrary to established Board law regarding the secrecy required by a voting booth. (H. O. 73-73).
56. Employer excepts to the Hearing Officer's refusal to allow the Employer to introduce photographs marked as Er. Rejected Exhibits 20A-20K and 20S-20V which show the complete voting booth set up with the base and legs as the manufacturer intended, and to present related proof on those photos. (H.O. 58, fn 22; Tr. 1006-23).
57. Employer excepts to the Hearing Officer's refusal to enforce the Employer's subpoena duces tecum issued to Isabelita Sombillo and/or to allow the Employer to call Ms. Sombillo as a witness who has information related to the origination

and procurement of photos and statements of employees used in the Petitioner's flyer marked as Er. Ex. 1. (Tr. 955-63).

58. Employer excepts to the Hearing Officer's refusal to enforce the Employer's subpoena duces tecum issued to Eliza Bates and/or to allow the Employer to call Ms. Bates as a witness who has information related to the origination and procurement of photos and statements of employees used in the Petitioner's flyer marked as Er. Ex. 1. (Tr. 955-963).
59. Employer excepts to the Hearing Officer's error in sustaining the Petitioner's objection to allowing Sheena Orozco's testimony regarding the impression and impact that Brian Walsh's text message to Crystal Pratts stating "we are winning" had on her. (Tr. 491-92).
60. Employer excepts to the Hearing Officer's refusal to consider the undisputed testimony from both parties that after the first voting session the Board Agent told the in-room observers that the second voting session, "cannot run like the first one did" as contrary to any record evidence, credited or uncredited. (H.O. 52, fn 18).
61. Employer excepts to the Hearing Officer's misapplication of law that "in cases involving allegations of Board Agent misconduct, the Board has ruled that where 'the alleged misconduct is the Board agent's failure to ensure the secrecy of the balloting, the Board will not set aside the election . . . absent evidence that someone witnessed how a voter marked his or her ballot.'" (H.O. 71).
62. Employer excepts to the Hearing Officer's misapplication of law that "when such a booth [only the cardboard shield] is used, the Board's analysis is limited to

whether a voter's ballot marking was observed by others while voting, or before the ballot was deposited in the ballot box." (H.O. 73).

63. Employer excepts to the Hearing Officer's misapplication of *Gormac Custom Manufacturing, Inc.*, 335 NLRB 1192 (2001) to the facts of this case. (H.O. 13).
64. Employer excepts to the Hearing Officer's misapplication of *Sprain Brook Manor Nursing Home, LLC*, 348 NLRB 851 (2006) to the facts of this case. (H.O. 13).
65. Employer excepts to the Hearing Officer's misapplication of the standard set forth in *BFI Waste Services*, 3438 NLRB 254 (2004). (H.O. 11-13).
66. Employer excepts to the Hearing Officer's legal conclusion that the discrepancies between the flyer and the releases do not constitute objectionable misrepresentation. (H.O. 13-14).
67. Employer excepts to the Hearing Officer's misapplication of the standard set forth in *Albertson's, Inc.*, 344 NLRB 1357 (2005), and *Mt. Carmel Medical Center*, 306 NLRB 1060 (1992). (H.O. 14).
68. Employer excepts to the Hearing Officer's legal conclusion that the record evidence does not support the Employer's contention that the irregularities in the releases amount to artful deception. (H.O. 14-15).
69. Employer excepts to the Hearing Officer's misapplication of the standard set forth in *Van Dorn Plastic Machine Co.*, 736 F.2d 343 (6th Cir. 1984). (H.O. 14-16).
70. Employer excepts to the Hearing Officer's misapplication of the standard set forth in *Midland National Life Insurance Co.*, 263 NLRB 127 (1982) and its progeny. (H.O. 11-15).

71. Employer excepts to the Hearing Officer's misapplication of *Champaign Residential Services, Inc.*, 325 NLRB 687 (1998) to the facts of this case. (H.O. 15-16).
72. Employer excepts to the Hearing Officer's misapplication of the evidentiary considerations set forth in *C&S Distributors, Inc.*, 321 NLRB 404 (1996) and *Queen of the Valley Hospital*, 316 NLRB 721 (1995) to the facts of this case, as Ikurekong was not a corroborating witness. (H.O. 26, n. 9).
73. Employer excepts to the Hearing Officer's misapplication of *Intertype Co.*, 164 NLRB 770 (1967) to the facts of this case, as Jacques' comments cannot be viewed in isolation. (H.O. 30).
74. Employer excepts to the Hearing Officer's legal conclusion that Jacques conduct cannot reasonably be characterized as electioneering. (H.O. 30).
75. Employer excepts to the Hearing Officer's legal conclusion that the record evidence does not support the Employer's allegation that the Petitioner engaged in objectionable conduct by sending text messages to and calling voters on the day of the election. (H.O. 37).
76. Employer objects to the Hearing Officer's conclusion that Walsh's statement "we are winning" sent to employees by text message on election day before the polls closed was allowable under *Midland National Life Insurance Co.*, 263 NLRB 127 (1982). (H.O. 40).
77. Employer excepts to the Hearing Officer's misapplication of *Virginia Concrete Corp.*, 338 NLRB 1182 (2003) to the facts of this case. (H.O. 39-40).

78. Employer excepts to the Hearing Officer's failure to apply the holding in *Milchem, Inc.*, 170 NLRB 362 (1968) to the facts of this case. (H.O. 39-40).
79. Employer excepts to the Hearing Officer's misapplication of the standard set forth in *Peerless Plywood*, 107 NLRB 427 (1953). (H.O. 39-40).
80. Employer excepts to the Hearing Officer's failure to apply the standard set forth in *Cross Pointe Paper Corp.*, 330 NLRB 658 (2000) to the facts of this case.
81. Employer excepts to the Hearing Officer's misapplication of the standard set forth in *Indek Energy Services of Turner Falls, Inc.*, 316 NLRB 300 (1995). (H.O. 46).
82. Employer excepts to the Hearing Officer's legal conclusion that the Board Agent's conduct did not raise a reasonable doubt as to the fairness and validity of the election. (H.O. at 57).
83. Employer excepts to the Hearing Officer's legal conclusion that the Employers' allegations about the conduct in the conference room during the election are not supported by evidence that would warrant setting aside the election. (H.O. 73-74)
84. Employer excepts to the Hearing Officer's legal conclusion that the voting booth provided adequate privacy for voters in this election. (H.O. 74).
85. Employer excepts to the Hearing Officer's erroneous conclusion that the cardboard shield used in this election was a "voting booth" within the meaning of Section 101.19(a)(2) of the NLRB's Rules and Regulations.
86. Employer excepts to the Hearing Officer's erroneous finding that the Board Agent did not violate Section 101.19(a)(2) of the NLRB's Rules and Regulations by leaving ballots on table for voters to pick up.

87. Employer excepts to the Hearing Officer's failure to set aside this election pursuant to *Columbine Cable Co.*, 351 NLRB 1087 (2007) and/or *Imperial Reed & Rattan Furniture, Co.*, 118 NLRB 917 (1957). (H.O. 73).
88. Employer excepts to the Hearing Officer's failure to apply *Allegheny Ludlum Corp.*, 333 NLRB 734 (2001) to the Petitioner's conduct that infringed upon employees' Section 7 rights in this case.
89. Employer excepts to the Hearing Officer's failure to find that the undisputed record evidence demonstrated that Petitioner interfered with witnesses and attempte to influence witness testimony during the hearing. (H.O. 79-80; Tr. 1243-44).
90. Employer excepts to the Hearing Officer's recommendation to overrule Employer's Objections 1, 2, 3, 4, 5, 6, 11, 12 and 13. (H.O. 80).
91. Employer excepts to the Hearing Officer's recommendation that Petitioner be certified as the exclusive bargaining representative for the employee's in the defined unit. (H.O. 81).

Respectfully submitted,

KIESEWETTER WISE KAPLAN PRATHER, PLC

By: 

JONATHAN E. KAPLAN

3725 Champion Hills Drive, Suite 3000
Memphis, Tennessee 38125
901-795-6695

Attorneys for Employer

CERTIFICATE OF SERVICE

The undersigned certifies that on the 28th day of February 2011, the foregoing pleading was filed via electronic filing with:

Lester A. Heltzer
Executive Secretary
National Labor Relations Board
1099 14th Street N.W.
Washington, DC 20570

and served via e-mail and Federal Express upon:

Rachel Mead Zweighaft, Hearing Officer
National Labor Relations Board, Region 29
Two Metro Tech Center
Brooklyn, NY 11201

J. Michael Lightner, Regional Director
National Labor Relations Board, Region 22
20 Washington Place, 6th Floor
Newark, NJ 07102-3115

Ellen Dichner, Esq.
Gladstein, Reif & Meginniss, LLP
817 Broadway, 6th Floor
New York, NY 10003



JONATHAN E. KARLAN